APPENDIX K

Excerpts of Transcript - Arguments on Presentence Report dated 5/16/97

MS WERNER-SIMON: Well, what I was --

THE COURT: And most judges feel that way.

MS. WERNER-SIMON: What I was trying to say, Your Honor, and what I meant was, that this isn't a mandatory minimum drug case. That was the light in which I was -- that this case, because of its nature and because of 3Bl.2, affords flexibility, I was thinking of Chapter 3 specifically. I was thinking of, in this case, one can -- I was thinking of the guidelines affords flexibility Such as under Chapter 3.

Unlike other systems, this mandates that the Court look at the victim under 3A. You look at the defendant's role under 3B. You look at whether there's obstruction under 3C, and I was trying to say that this, unlike the drug cases, is a place where the guidelines can afford flexibility to address rightfully, and I can --

THE COURT: Intellectually, you apply the guidelines-- if you apply the guidelines as they are intended to be -- but to manipulate the facts or to twist facts in a way that's slanted in one direction, isn't correct. Isn't the right way to do it .

MS. WERNER-SIMON. What I was thinking of was application note one. Application note one talks about when you assess the minimal participant role. It talks about an individual who --

THE COURT: To rarely use.

MS. WERNER-SIMON. Yes, Your Honor.

THE COURT: And yet you say this is a perfect case for it.

MS WERNER-SIMON: Yes, I do, Your Honor. Your Honor? Your Honor, application note two, the language that I was relying on when I made this argument and wrote this, is that, the individuals who are among the least culpable, are among, not the least culpable, but are among the least culpable in the involvement. And in focusing on just this particular scheme, it is

my opinion, and for whatever it's worth, which obviously, you have every right to discard and say I have no merit or things are done differently somewhere, and you can totally disregard what I have to say, but that was my analysis. I was looking at application note one, and these words, where unlike a drug case where when I used to do organized crime in drug cases, this afforded incredible flexibility in terms of my perception. My perception, not yours, not probation, but my perception of her culpability, and I looked at the words, "are among the least culpable", not the least culpable, but are among the least culpable; and I looked at everyone's role and I spent time, you know, before I left the office, briefly, for purposes of my appointment. I spent time, actually, several days or like eight days preparing the notebook for Your Honor, drawing the chart, assessing, trying to quantify this individual's role. Looking at the documents, looking at -- to see whether even, you know, the statements by other agencies had support, and coming up with the white notebook, and I did that in the light of "are among" .

Then the other thing with respect to application note one when I looked at it, I looked at the language. I looked at the language; has she or he demonstrated a lack of knowledge or understanding of the scope and structure of the enterprise and the activities of the others involved. That's what it says, when I looked at the application --

THE COURT: You're talking overall conspiracy?

MS WERNER-SIMON: It says --

THE COURT: You're talking about the hundred million dollar fraud?

MS. WERNER-SIMON: No. I'm looking at it in the light of this scheme, which I could prove by a preponderance. That's what I'm looking at it under.

THE COURT: Where the plea agreement says the amount of losses --

MS. WERNER-SIMON: Approximately, that amount. I cannot -- if I may, Your Honor, I'll look for you. The $770,000 amount.

THE COURT: How much did she get?

MS. WERNER-SIMON: Of that?

THE COURT: Yes.

MS WERNER-SIMON :She didn't get any of that. She...

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THE COURT: "Off-loading packages by moonlighters, carrying drugs in secret compartments of clothing surely is more obviously criminal than signing documents as requested by a prize client of your employer". Ma'am, I don't know where you're coming from.

MS. WERNER-SIMON: What I was doing, Your Honor, is talking about the example that is given in the guidelines, which is the drug example, and how there is no fraud example. And the guidelines talk about, in the cases in this circuit, talk about the in-depth analysis and the examples here are with respect to the drug cases. The application notes talk about drug cases. It talks about the drug defendant. It says here in application note two, which is what I was addressing, application note two, my statements were made to support the position of infrequency.

Your Honor, I can only remember two or three occasions where I have -- that I can remember -- thought a defendant in, federal prosecution since '86, where defendants, as I can recall, warranted a minimal role. I have never written a plea agreement --

THE COURT: The probation office disagrees with you.

MS. WERNER-SIMON: Yes, Your Honor, that's correct. They do. Yes. And that is why I'm here in Buffalo.

THE COURT: Probation officer on the last page entitled, "Change in guideline calculations" says "in reviewing the court the minimal role, as noted in application note two, indicates that this adjustment is to be used infrequently, and generally applies to a person who is involved in a single incident". We don't have that here either, do we?

An argument may be -- "an argument may able to be made in comparison to everyone else in the whole conspiracy, she had a minimal role. In this officer's view, the argument would even be weak by the simple fact that a two level upward adjustment was made for more than minimal planning. The defendant's participation in the scheme span a significant period of time and involves many transactions, regardless if it was done with criminal intent.

However, the defendant is not being held accountable for the whole conspiracy, simply being held accountable with the scheme, within the twenty-five scheme conspiracy. Given this

consideration a four level downward adjustment does not seem warranted. However, it is clear that even considering just the Loma Linda scheme, there were others involved with greater levels of culpability than the defendant. Despite the fact that her participation spanned a twenty-five month period of time and involved at least five documents, a minor role reduction isn't warranted".

MS. WERNER-SIMON: And I was responding, Your Honor, to that application note four when I discussed the analogy with the marijuana conspiracy. Ms Goodman by her own admission